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In the Supreme Court of the United States

OCTOBER TERM, 1975

SALVATORE SARULLO AND
GARY M. SOLOMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that their retrial was barred by collateral estoppel.

After a jury trial in the United States District Court for the Western District of Tennessee, each petitioner was convicted on nine counts of willful misapplication of bank funds, in violation of 18 U.S.C. 656 and 2, and one count of conspiracy willfully to misapply bank funds, in violation of 18 U.S.C. 371. Each was sentenced to concurrent terms of thirty months' imprisonment on each count. The court of appeals affirmed (Pet. App. 23-31).

The evidence showed that petitioner Solomon was assistant cashier of the Memphis Bank and Trust Company. Petitioner Sarullo maintained two personal checking accounts at the bank. Petitioners entered into a scheme by which Solomon, without authorization by higher bank officials, advanced funds from a special "collections in

transit" or "A-71" bank account, in order to enable Sarullo to purchase securities. The bank had entrusted daily operation of the special account to Solomon (A. 65b-66b).[1]

The A-71 account was designed by the bank to assist specially approved customers in transferring or collecting funds (frequently the purchase price of corporate stocks) by means of two procedures: "drafting out" and "drafting in." "Drafting out" involved, in the case of stock brokers, an advance of funds to the broker from the A-71 account equal to the price at which he sold the stock, upon receipt by the bank of the stock certificate. The bank would then forward or "draft out" the stock to a correspondent bank together with a collection letter. On receiving collection, it would then redeposit the funds in the A-71 account and charge the broker interest for the period of the advance (A. 14b-15b, 29b, 66b-67b). "Drafting in" involved the bank's receipt of stock that the broker had purchased elsewhere and that had been forwarded to the bank for collection. The bank would release the stock to the broker only when he paid in the purchase price (A. 15b-17b).

Beginning in late August 1969, petitioners utilized the A-71 account in an unauthorized manner. On nine occasions Solomon transferred funds to Sarullo's personal checking accounts by debiting the A-71 account, although Sarullo had not received the necessary approval as an A-71 customer (A. 19b, 54b). In each case Solomon recorded in the bank's journal that the advance was "[f]or stock sent for collection," although he received no stock from Sarullo as security,[2] and charged no interest for the funds advanced (A. 57b). Sarullo used the funds to purchase stocks. These advances were concealed by means of a "rolling entry," by which Solomon transferred funds from the A-71 account to Sarullo's account (falsely noting in the bank journal that the advance was "[c]redit for stock sent for collection") and simultaneously transferred an amount from Sarullo's account to the A-71 account sufficient to erase the previous smaller advance to Sarullo's account (A. 95b-97b). Petitioners' plan was for Sarullo to repay the respective advances once he resold the stock; the advances in fact resulted in a net loss to the bank of $286,000 (A. 77b).

[1] "A." refers to the government's appendix in the court of appeals.

On July 12, 1971, a ten-count indictment was returned against petitioners. The first count charged them with conspiring to misapply funds of a federally insured bank for a period of time prior to December 3, 1969, in violation of 18 U.S.C. 371. Counts 2 through 10 charged them with nine specific instances of willful misapplication of funds between August 26, 1969, and November 4, 1969, on the occasions when Solomon had advanced funds to Sarullo, in violation of 18 U.S.C. 2 and 656.

On July 24, 1972, after petitioners' first trial under this indictment, the jury returned a verdict of guilty on the substantive counts; the court declared a mistrial on the conspiracy count. Thereafter the district court granted petitioners' motion for a new trial based on newly discovered evidence.

On July 19, 1971, a second indictment was returned, charging petitioners and two others, John Veazey and James Lambert, with conspiracy and three substantive

[2] A. 82b-83b, 90b, 100b, 113b, 116b-117b, 119b-120b, 124b-125b, 134b-135b, 145b-146b.

counts of misapplying funds of the Memphis Bank and Trust Company during the approximate time period charged in the Solomon-Sarullo indictment. On March 2, 1973, after trial on this second indictment, the court directed a verdict of not guilty on one of the substantive counts and the jury returned a verdict of not guilty on the three remaining counts.

Petitioners then moved to dismiss the first indictment, alleging that their acquittal on the allegations contained in the second indictment collaterally estopped the government from trying them on the allegations contained in the first indictment. The district court denied the motions to dismiss the instant indictment (Pet. App. 73) and upon retrial petitioners were convicted on all counts (see p. 1, *supra*). The court of appeals affirmed, reasoning that the allegations contained in the instant indictment encompassed different transactions, unrelated to the transactions alleged within the second indictment, despite the fact that the modus operandi was the same (Pet. App. 30-31).

1. Petitioners contend that the evidence introduced to show their intent with regard to the offenses charged under the second indictment was the same as that introduced at the subsequent trial to show intent with regard to the offenses charged under the first indictment, and therefore that their acquittal on all counts of the second indictment determined the "ultimate fact" of intent and collaterally estopped the government from prosecuting them under the first indictment.

The test for determining whether the government is collaterally estopped from prosecuting a criminal defendant is "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe* v. *Swenson*,

397 U.S. 436, 444. In *Ashe* the issue held to be foreclosed was the defendant's identity as one of the robbers, after his previous acquittal had rested unmistakably on the jury's finding that he had not been a participant in the robbery.

In the instant case, the issue that petitioners contend should have been foreclosed from consideration was the question of their intent. As the court of appeals stated (Pet. App. 28):

> "[C]riminal intent," being a state of mind, may be determined only from the attendant facts and circumstances to which it bears a direct relationship. One may possess a criminal intent in one framework of facts but be perfectly innocent in another.

Petitioners' acquittal with respect to the transactions alleged in the second indictment did not dispose of the question of their intent with respect to the entirely distinct transactions alleged in the first indictment.

The second indictment charged that petitioners, together with Veazey and Lambert, formed a partnership under the name of "Security Investors" to engage in the buying and selling of stock, and that on a number of specified occasions Solomon used the A-71 account to advance funds to Security Investors for stock purchases without demanding either security or interest and without the approval of higher bank authorities, resulting in a net loss to the bank of $21,000 (Pet. App. 26-27). At the trial on these charges the government introduced no evidence relating to the Solomon-Sarullo transactions. Indeed, as Sarullo conceded at the hearing on his motion to dismiss his dealings with Solomon had been personal; his partners in Security Investors neither knew of them nor shared in the profits from them (A. 234b, 239b-240b), and the two

endeavors comprised completely separate transactions (A. 237b). A jury could therefore find that petitioners acted with criminal intent in their mutual transactions, but without such intent in their separate Security Investors transactions.[3]

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[3]An examination of the government's proof with regard to specific charges under the second indictment further demonstrates why the acquittal was not conclusive as to petitioners' intent in carrying out the transactions alleged under the first indictment. The second indictment charged a conspiracy by Sarullo, Lambert, Veazey and Solomon wrongfully to transfer, and two substantive counts of their having transferred (on July 22 and September 9, 1969), funds from the A-71 account to Security Investors. One additional substantive count charged that on November 21, 1969, Solomon had released stock to Security Investors in return for a check drawn by the firm without sufficient funds. With respect to the July 22 transaction, $15,000 had been credited to Security Investors' account on that day, as charged, but a bank officer testified that on July 10 a collection letter had been sent out in behalf of Security Investors to which stock having a sale price of $15,000 was actually attached. Thus, as the officer conceded, the July 22 transaction, apparently supported by the July 10 collection letter, was "somewhat similar" to legitimately authorized "A-71" transactions: "A draft was sent out of the bank. They did have stock attached" (A. 207b). Similarly, a government witness testified that one of the defendants, Veazey, had received a $15,000 advance on August 14, 1969, which was secured by stock sent for collection and which, moreover, had received prior approval from a higher bank official. A bank officer testified that this, too, was a legitimate transaction in every respect except that Veazey had not been charged interest (Cr. 71-160, Tr. IV 278-280; Pet. App. 136-139). Thus, the jury could reasonably have doubted whether the conduct of Veazey and his partners in Security Investors in obtaining credit a month earlier and a month later manifested a criminal intent. Petitioners note (Pet. 10) that they relied on the Veazey transaction at both trials as exculpatory evidence. But (as reflected in the opposing jury verdicts) the Veazey transaction merely showed that in their associations with Veazey and Lambert petitioners had chosen to, or been compelled to, act legitimately; when acting between themselves, however, they had not.

Moreover, the evidence in the Security Investors case showed that in excess of $1,000,000 had been advanced to Security Investors through Solomon (Pet. App. 26-27); yet the overt acts and substantive

2. Contrary to petitioners' further contention, there is no conflict among the circuits on this issue. Petitioners refer (Pet. 9-10) to several items of evidence that were introduced at both trials, and assert that, under decisions of the Second and Fifth Circuits, the government would not have been permitted to relitigate such "evidentiary facts" (Pet. 17-19). But the decisions upon which petitioners rely hold merely that the prosecution may not attempt to prove its case at a second trial by asserting facts that were necessarily determined against it at the first trial.[4] In the instant case petitioners' acquittal on the allegations contained in the second indictment did not necessarily invalidate the various items of evidence

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offenses charged in that indictment alleged the wrongful transfer of only approximately $120,000, and the evidence showed a net loss to the bank of $21,000. In contrast, the instant indictment specifically alleged the wrongful transfer of almost $900,000 from Solomon to Sarullo, and the evidence showed a net loss to the bank of $286,000. Thus, the Security Investors jury could reasonably have concluded that the advances from Solomon to Security Investors were, on the whole, at least adequately secured and therefore there was no criminal intent regarding such transactions.

[4]In *Blackburn* v. *Cross*, 510 F.2d 1014 (C.A. 5), the court held invalid the state's attempt in a prosection for sexual assault to introduce evidence of a previous assault by the defendant in the same apartment complex, notwithstanding his acquittal on that charge. In *United States* v. *Kramer*, 289 F.2d 909 (C.A. 2), also relied on by petitioners, the court reversed a conviction predicated on the government's attempt to relitigate the "single question, of the starkest simplicity" (*id.* at 914), namely, the identity of the thief, after that issue had been determined adversely to the government. The court held that the prosecution could "not prove the new charge by asserting facts *necessarily determined* against it on the first trial * * * *" (*id.* at 916; emphasis added). In *Wingate* v. *Wainwright*, 464 F.2d 209 (C.A. 5), the state introduced in a prosecution for robbery evidence of the defendant's commission of an earlier robbery, after he had been acquitted on charges arising from the episode. Because the issue whether he had committed the earlier robbery had thus necessarily been determined, the court of appeals rejected the attempt to relitigate this "ultimate fact," stating:

> The prosecution simply may not in the course of any subsequent trial of the same parties relitigate an issue which was determined as an issue of ultimate fact in an earlier prosecution. [464 F. 2d at 214.]

(including Solomon's handwritten notations on the general ledger card, his receipt of a check from Security Investors, and three credit letters he wrote on behalf of Sarullo and Security Investors) that had been introduced at that trial and were subsequently introduced at the trial on the allegations contained in the first indictment. The truth or accuracy of these items of evidence was not at issue at the former trial; the question was whether this evidence, along with other evidence introduced at that trial, showed a willful misapplication of bank funds with regard to certain Security Investors transactions. The determination of the trial court and jury that the evidence in this context did not prove willfulness with regard to the Security Investors transactions therefore did not preclude a subsequent finding, based upon some of the same evidence, of willfulness with regard to the Solomon-Sarullo transactions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.